

APR 10 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVID E. BURGERT, JR.,

Defendant - Appellant.

No. 04-30505

D.C. No. CR-04-00021-DWM

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding

Submitted April 5, 2006**

Before: HAWKINS, McKEOWN, and PAEZ, Circuit Judges.

David E. Burgert, Jr., appeals from his 87-month sentence imposed after pleading guilty to conspiracy to possess illegal firearms, possession of a machine gun, and two counts of felon in possession of a firearm, in violation of 18 U.S.C. §§ 371, 922(o), 924(a)(2), 922(g)(1), and 924(a)(2), respectively. We have

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction pursuant to 28 U.S.C. § 1291, and we remand for resentencing.

We reject Bergert's contention that inclusion of several statements in his pre-sentence report violated his due process rights. *See United States v. Robertson*, 901 F.2d 733, 735 (9th Cir. 1990). However, because Burgert was sentenced under the then-mandatory Sentencing Guidelines, we remand for the district court to proceed pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084-85 (9th Cir. 2005) (en banc). *See United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005) (extending *Ameline*'s limited remand procedure to cases involving non-constitutional *United States v. Booker*, 543 U.S. 220 (2005), error).

REMANDED.